No. 97-2024

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ARTHUR CALDERON, Warden of the California State Prison at San Quentin, *Petitioner*,

v.

DOUGLAS DANIEL CLARK, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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(CAPITAL CASE)

QUESTION PRESENTED

1. IS THE RULING OF A DISTRICT COURT ON WHETHER A STATE PRISONER SEEKING FEDERAL HABEAS CORPUS RELIEF HAS AUTHORIZED A HABEAS CORPUS PETITION SUBJECT TO THE "COLLATERAL ORDER" APPEAL DOCTRINE IN COHEN V. BENEFICIAL LOAN CORP., 337 U.S. 541 (1949)?

2. IS SUCH A PETITION AUTHORIZED UNDER 28 U.S.C. § 2242 WHERE THE PRISONER DISAVOWS IT?

LIST OF PARTIES

1. Arthur Calderon, Warden of the California State Prison at San Quentin, Petitioner.

2. Douglas Daniel Clark, Respondent.

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INTRODUCTION

In his "Brief in Opposition" (hereinafter "Opposition" cited as "Opp.") to the Warden's "Petition for Writ of Certiorari" (hereinafter "Petition" cited as "Pet.," Clark attempts to minimize the import of this case by mischaracterizing the dispute as being a minor technical one over the whether the verification was proper. To the contrary, the state prisoner has disavowed the petition and the question is whether the petition is legitimate at all. As quoted more fully below, the state prisoner announced, in a court-solicited *pro se* pleading that he "totally rejects as false, fraudulent, and perjurious the [petition and other document counsel] caused to be filed over my sworn verification." The Opposition also attempts the impossible task of arguing that the collateral order appeal doctrine is not appropriate to resolve the question of the legitimacy of a habeas corpus petition. However, the Opposition addresses the latter point first and the former point last. Although this is confusing, in the interests of not further confusing matters, the Warden will do likewise.

ARGUMENT

I.

AN ORDER DETERMINING WHETHER A STATE HABEAS CORPUS PETITION IS VALID IS IMMEDIATELY APPEALABLE

The Opposition seeks to first convince this Honorable Court that the collateral order appeal doctrine in Cohen v. Beneficial Loan Corp., 337 U.S. 541 (1949) should not apply to the dispute here. He maintains this position by an erroneous reading of Gulfstream Arrow Space Corp. v. Mayacamas Corp., 485 U.S. 271, 275 (1988).

The Opposition, relying on Gulfstream, erroneously asserts that the Cohen doctrine does not apply unless the appealed order deprived the would be appellant of a right guaranteed by legislation, either statutory or constitutional. Opp. at 5. This is flatly wrong. Gulfstream never stated that a prerequisite to the application of the Cohen doctrine was the existence of a legislative "right." Indeed, the Opposition's cite of Gulfstream for that proposition only refers back to language in Cohen itself that a decision is appealable if it determines "claims of right" apart from the merits of the action. However, nothing in that language expressly limits the collateral order appeal doctrine to cases, such as Cohen which do involve legislatively granted rights.

To the contrary, the three part test in Gulfstream focuses on disputes, questions and issues. As the opposition recites, the first part of the test is whether the order appealed "conclusively determine[s] the disputed question." The second part of the test is whether the

order appealed resolves an "important issue completely separate from the merits of the action." Lastly, the third part of the test is whether the order appealed is "effectively unreviewable on appeal." Opp. at 4. None of these tests involve the existence of any statutory or constitutional "right." As such, the Opposition is wrong in its misguided belief that the petition should be rejected because there is no provision of law protecting any statutory or constitutional "right" sought to be vindicated here.

Petitioner attempts to argue that the State's right not to be forced to defend an invalid petition is 1) not a claim of right recognized by Cohen, and 2) not as important as other rights recognized in other collateral order appeal cases. The Warden has already disposed of the first contention. The second proposition, that the State's interest in not having to litigate an invalid petition is not important, requires no argument to dismiss.

As to the first part of the Gulfstream test, finality, here, the district court's order conclusively determined and resolved the "authorization" question. The Order found the petition to be authorized and that ended the subject excepting appeal. That decision was not temporary, it was final. For any further hearing, the Warden must look to the appeal. The only question is whether that appeal should be now or later.

The Ninth Circuit opinion and the Opposition here erroneously interprets this part of the Gulfstream test as whether or not the losing party will ever get another chance to litigate the question. This is clearly wrong. The reason for this part of the Gulfstream test is to assure that the appellate court will not review, on appeal, a decision which is only temporary in the eyes of the district court and one that was not even meant to be the last word on

the subject at the district court level. The rule does not demand, as a prerequisite to appellate review, that the order be the last word on the subject for all time. Obviously, the district court has the power to issue few orders that are unreviewable. The position of the Ninth Circuit and the Opposition is, therefore, not only erroneous but frivolous.

Next, Gulfstream requires that the appealed order resolve a question "separate from the merits of the action." The Opposition surprisingly challenges this step. Incredibly, it maintains, in doublespeak, that if certiorari is granted, "the result would be an order setting forth the parameters of . . . [the] petition [below], claim by claim. Surely this is not separable from, collateral to, nor independent of the cause itself." Opp. at 7.

This part of the Gulfstream test simply asks whether the order involves the merits of the dispute. If it does, then, like the other merits of the action, it can be reviewed in the regular course of a normal appeal. If it does not, and the other parts of the test are satisfied, then a collateral order appeal will lie.

Whether the petition is "authorized" has nothing to do with the merits of the petition. The merits of the petition are the validity, or lack thereof, of the claims inside the petition. All of the claims in the petition filed in district court on behalf of the petitioner could be meritorious, yet, it is the Warden's position, if the petition is unauthorized, instead of determining the merits of those claims, the petition should be either dismissed or changed to become authorized. Since dismissal is a grave result, it follows that the issue is also an "important" one.

Conversely, even if all of the claims in the petition lack merit, the state prisoner still has the right to

proceed with the litigation through final judgment, if the petition is authorized. As such, the authorization question has nothing to do with the merits of the claims because a fully meritorious petition cannot be heard if unauthorized and even a completely unmeritorious petition must be heard if authorized. As such, the decision decided an issue "separate from" the merits of the petition and the second test was satisfied.

Lastly, the Opposition does not even venture forth to argue that the third part of the Gulfstream test is not satisfied. Nor can it. The third part asks whether the Order appealed from is "effectively unreviewable" on appeal. If it is, then the collateral appeal doctrine will apply. Here, without question, it is. Once, the judgment is entered, the Warden will have already undergone all the time and expense of litigation. If the petition is then found to be "unauthorized" on appeal, there would be no way the State could ever recoup that lost time and expense. In addition, there might be the "double whammy" that occurred in Deutscher v. Angelone, 16 F.3d 981 (9th Cir. 1991) should the prisoner then be allowed to file a new "authorized" petition, which the Warden would have to expend additional time and resources defending against.

Incredibly, although even the Opposition itself does not challenge this unchallengeable point, the contrary position seems to be the very basis of the decision of the Ninth Circuit. In the Warden's recently filed "Supplemental Brief Advising Court of Subsequent Decision by the Ninth Circuit," he pointed out that in the cases of Calderon v. U.S.D.C. (Stansbury), filed August 13, 1998, in No. 98-70733 (9th Cir. 1998) and Robert Edward Stansbury v. Arthur Calderon, filed August 5, 1998, in No. 98-99004 (9th Cir. 1998), related cases that are nearly identical to the instant case, the Ninth Circuit boldly

advanced its opinion that where the question of whether the petition is validly authorized is in doubt, "There is no indication that the issue cannot be raised on direct appeal after the habeas petition proceeds through district court." See Supplemental Appendix S. This is an astounding proposition[1/] that begs certiorari review.

II.

THE ISSUE HERE IS NOT MERELY SOME PETTY DISAGREEMENT ABOUT THE VERIFICATION BUT INSTEAD IS ABOUT WHETHER THE PETITIONER HAS DISAVOWED THE PETITION

Petitioner mischaracterizes the dispute below attempting to minimize it to the point where it merely concerns a defective verification. This is patently false. The dispute involves a dispute over authorization. As shown in the petition, after being permitted by the district court judge to file his own *pro se* pleadings on the authorization issue, petitioner not only filed a document entitled "Petitioner's Actual Opposition to Fujioka's Perjurious Documents filed April 23 (the petition itself) And June 16, 1997 (the counsel's opposition to the Warden's motion to dismiss as unauthorized)," but also stated clearly, in the first sentence, "PETITIONER totally rejects a false, fraudulent and perjurious the documents Fred Fujioka caused to be filed over my sworn verification April 24, 1997, and the totally misleading and false claims in his filing in behalf of 'Petitioner' but without my

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1. In fact, the Warden maintains that a proper authorization goes to the jurisdiction of a federal court to entertain a habeas corpus petition.

knowledge, approval or consent, on JUNE 16, 1997." See Appendix G, caps in original.

Unlike the case here, a verification dispute has to do, like in the cases cited by the Opposition, with a missing signature, a deficiency in the Oath, or some other technical complaint, that can easily be remedied without rendering the ensuing litigation a legal nullity. This is far more serious than some technical deficiency in a pleading.

As such, since the Opposition has either misstated or misinterpreted the issue, all of its argument in section A of the second argument, relating to cases dealing with technical deficiencies in the verification, are inapposite and inappropriate to respond to in this context. Opp. at 8-10.

Moving to section B of argument II, it can be seen that the Opposition there attempts to advance the proposition that the petition is, in any case, "sufficiently verified." As stated above, this is not a "verification" issue but an "authorization" issue and the Warden will only address the arguments in section B insofar as they are relevant to "authorization."

First, the Opposition attempts to distinguish this case from Deutscher on the grounds that there the counsel filed the habeas petition without the client's notification or authorization. However, as Appendix G demonstrates, the prisoner's counsel in the instant case may have done even worse. It is undisputed that he filed the petition without the prisoner's "knowledge, approval or consent," thus at least matching the error in Deutshcer. Moreover, if the prisoner is correct, counsel additionally fraudulently attached the prisoner's verification to a document for which counsel knew the verification was not

intended. Thus, the petition here was far less "authorized" than in Deutscher.

Moreover, present here but lacking in Deutscher, the prisoner has, before commencement of litigation, filed a document, at the district court's request, specifically disavowing the petition and, even objecting to his counsel's pleading opposing the Warden's motion to dismiss on the very ground of lack of authorization. If this is not lack of authorization, then there is no such thing.

Next, the Opposition points out that the state prisoner here "wanted a habeas corpus petition filed on his behalf . . .." Opp. at 11. That is irrelevant because such was also the case in Deutscher. The basis of the Deutscher decision was not, in any part, based on the fact that the prisoner there eschewed habeas relief because he did not. Indeed the Deutscher case was brought to clear the way for the bringing of a new habeas petition by that prisoner on the grounds that it would not be second or successive because the prior petition had not been "authorized."

The Opposition next argues that the prisoner "simply had disagreements with his prior counsel. . .." Opp. at 11. Despite the fact that this characterization is like calling the Civil War a "disagreement" between the States, the fact remains that, as shown above, the prisoner disavowed the petition. One might ask why, if the prisoner does not accept the petition, why should the State be forced to defend against it.

The Opposition next attempts to advance the argument of the district court that the petition is valid because counsel was not acting as an "intermeddler" (Appendix C). Opp. at 11. It does not matter. The state prisoner had the right to control the contents of the

petition. His attorney had only as much authority as the state prisoner desired to surrender. Where the state prisoner was so dissatisfied with the petition that he disavowed it and deemed it unauthorized, the fact that the counsel was not an "interloper" was of no import. The petition was still unauthorized and thus invalid.

Lastly, the Opposition attempts to insinuate into the discourse evidence outside of the record when he argues that the prisoner has, since the time the Order appealed from was litigated in the district court, "been very active, and has fully agreed with, the bringing of his habeas corpus petition." Respondent cannot raise matters on certiorari review which have not been raised below. Demarest v. James, 498 U.S. 184, 189, 111 S. Ct. 599, 112 L. Ed. 2d 608 (1991).

However, while attempting to so prejudice this certiorari review in this manner, the Opposition fails to realize that its own argument can be turned against itself as one notes the glaring absence from the district court record, for all of the alleged "new" cooperation of the prisoner, of any "new" verification or authorization of the petition. In other words, the prisoner has still not "authorized" this petition. The prisoner's last words remain that he disavows the petition. If this petition is denied on its merits, the prisoner, who the California Supreme Court called "someone with [a] history of manipulative . . . conduct" (People v. Clark, 3 Cal. 4th 41, 96, 833 P.2d 561, 10 Cal. Rptr. 2d 554 (1992)) can still "have his cake and eat it too" by simply announcing that he had never authorized the petition as he had made clear from the outset and should be, as in Deutscher, entitled to litigate a new one. As such, the Opposition's vague and improper hints that "all is now well" should not be utilized as a basis for denying certiorari review.

CONCLUSION

For the aforestated reasons, the Warden respectfully prays that the petition for certiorari be granted and, after a hearing or by a *per curiam* decision, the Court of Appeals for the Ninth Circuit be ordered to reinstate the collateral order appeal or, if this Court finds that the Ninth Circuit decision was on the merits, this Court grant a hearing to determine whether a petition can be "authorized" where an indigent state prisoner so objects to part of its contents that he disavows it.

Dated: August 21, 1998.

Respectfully submitted,

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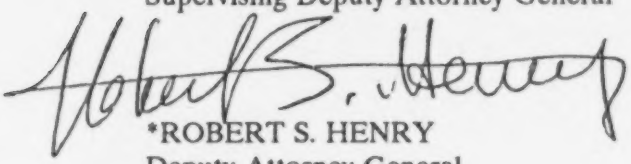

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